IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. ANTHONY CARLOS MARTINEZ, Appellant.	)	2 CA-CR 2006-0117 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20052426

Honorable Howard Hantman, Judge

AFFIRMED

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E S P I N O S A, Judge.

¶1 After a jury trial, appellant Anthony Martinez was convicted of attempted second-degree murder, attempted aggravated assault with a deadly weapon, and endangerment. He was sentenced to mitigated, concurrent prison terms, the longest of which was seven years. On appeal, he argues the trial court erred by denying his motion to continue

the trial, refusing to instruct the jury it could convict him of attempted manslaughter, and committed fundamental error by giving an erroneous instruction on attempted second-degree murder. For the reasons expressed below, we affirm the convictions and sentences.

Factual and Procedural Background

¶2 We view the evidence in the light most favorable to sustaining the verdicts and resolve all reasonable inferences against Martinez. *See State v. Greene*, 192 Ariz. 431, ¶ 12, 967 P.2d 106, 111 (1998). In May 2005, Martinez, Noel Rivera, Manny Mayer, and an individual known only as "Albert" left a party together in a vehicle they borrowed from another person attending the party. Martinez, a member of a gang, informed Rivera, who drove, that he wanted to fight Ramon Alday, who belonged to a rival gang, and instructed him to drive past a residence that belonged to Alday's cousin. As they passed the residence, Martinez told Rivera to slow the vehicle, drew a gun, and fired four or five shots at the home. He then directed Rivera to drive past a residence that belonged to Alday's mother and again told Rivera to slow the vehicle, drew a gun, and fired several shots. Martinez was charged with two counts of drive-by shooting, two counts of attempted first-degree murder, two counts of attempted aggravated assault, and one count of endangerment. He was convicted and sentenced as described above. This appeal followed.

Motion for Continuance

¶3 A few days after the shooting, Mayer identified Martinez as the shooter during an interview with Tucson Police Department Detective Brett Barber. The day before the trial, Mayer confirmed with the prosecutor and a defense investigator that Martinez had been

the shooter. At some earlier point, however, Mayer had told Martinez's sister during a conversation she had recorded that Albert had been the shooter.[1] During a recess on the first day of the trial, Mayer told Barber and the prosecutor that Albert had been the shooter, then recanted and explained he had been threatened by Martinez's father. Martinez's trial counsel moved for a continuance, which the trial court denied.

¶4 Rule 8.5(b), Ariz. R. Crim. P., 16A, A.R.S., provides that a continuance "shall be granted only upon a showing that extraordinary circumstances exist and that delay is indispensable to the interests of justice." We will uphold a trial court's denial of a motion for a continuance unless there is a clear abuse of discretion. *State v. Cramer*, 174 Ariz. 522, 525, 851 P.2d 147, 150 (App. 1992).

¶5 Martinez contends a continuance was "indispensable to the interests of justice" because he "learned at the eleventh hour that Manny Mayer, a key witness in the State's case, had changed his story."[2] The record, however, clearly shows that Martinez had been aware prior to the first day of trial that Mayer had offered conflicting accounts of the shooter's identity. Specifically, in requesting a continuance, Martinez's trial counsel acknowledged that he knew "Mayer ha[d] not been saying all along that [Martinez] did it" and that he had "a tape recorded conversation of [Mayer] telling [Martinez]'s sister and another [person] that in fact [Martinez] didn't do it, that . . . Albert did it." Thus, we cannot say the trial court

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[1]During trial, Mayer claimed he had done so to make Martinez's family "feel better" and to protect his own family from Martinez's father, who had threatened him.

[2]Although the state asserts that Martinez "forfeited" this claim by failing to raise it to the trial court, the record shows that the issue was sufficiently raised.

abused its discretion in finding that Mayer's changed story about the shooter's identity did not constitute "extraordinary circumstances" mandating a continuance.

¶6 Martinez also claims his trial counsel "required additional time . . . to explore possible methods of impeach[ing Mayer] and uncover further exculpatory evidence." But we have repeatedly held it is not an abuse of discretion to deny a continuance where the information sought is for impeachment purposes. *See State v. Griffin*, 117 Ariz. 54, 56, 570 P.2d 1067, 1069 (1977); *State v. Jackson*, 112 Ariz. 149, 154, 539 P.2d 906, 911 (1975); *State v. Cotton*, 103 Ariz. 408, 409, 443 P.2d 404, 405 (1968); *State v. Eisenlord*, 137 Ariz. 385, 392, 670 P.2d 1209, 1216 (App. 1983); *State v. Loyd*, 118 Ariz. 106, 110, 574 P.2d 1325, 1329 (App. 1978). And Martinez has failed to show what, if any, exculpatory evidence he would have uncovered had the continuance been granted. Thus, we cannot say the court abused its discretion here. *See State v. Bishop*, 137 Ariz. 5, 9, 667 P.2d 1331, 1335 (App. 1983) (trial court did not abuse discretion in denying motion for continuance where "no real showing that the witness would have furnished testimony that would have altered the outcome of the case").

Attempted Manslaughter Instruction

¶7 Martinez next contends the trial court erred in refusing to instruct the jury on attempted manslaughter. Generally, a defendant is entitled to an instruction on any theory reasonably supported by evidence. *State v. Anderson*, 210 Ariz. 327, ¶ 60, 111 P.3d 369, 385 (2005). We review a trial court's refusal to give a jury instruction for abuse of discretion. *Id*.

¶8 One week before the shooting, Alday left several threatening messages on Martinez's cellular telephone. Martinez contends these messages provided "more than sufficient evidence of provocation that mandated the giving of an attempted manslaughter instruction" as defined in A.R.S. § 13-1103(A)(2)—attempted second-degree murder committed "upon a sudden quarrel or heat of passion resulting from adequate provocation by the victim." As the state correctly points out, however, words alone are not adequate provocation to justify a manslaughter instruction. *See State v. Runningeagle*, 176 Ariz. 59, 68, 859 P.2d 169, 178 (1993); *State v. Vickers*, 159 Ariz. 532, 542, 768 P.2d 1177, 1187 (1989). Therefore, the trial court did not err when it found a manslaughter instruction was not supported by the evidence.

Attempted Second-Degree Murder Instruction

¶9 Martinez lastly contends the trial court committed fundamental error by giving an erroneous instruction on attempted second-degree murder. To prove fundamental error, Martinez "must show three things: 1) error occurred, 2) the error 'goes to the foundation of the case, takes away a right that is essential to his defense, and is of such magnitude that he could not have received a fair trial,' and 3) the error caused him prejudice." *State v. Cox*, 214 Ariz. 518, ¶ 23, 155 P.3d 357, 362 (App. 2007), *quoting State v. Henderson*, 210 Ariz. 561, ¶ 24, 115 P.3d 601, 608 (2005).

¶10 The court's attempted second-degree murder instruction provided:

> The crime of attempted second-degree murder requires proof of any one of the following: One, the defendant attempted to intentionally cause the death of another person; or two, defendant attempted to cause the death of another person by

> conduct which he knew would cause death or serious physical injury.

Martinez claims the instruction improperly permitted the jury to find him "guilty of attempted second degree murder if it found that [he] knew his conduct would cause serious physical injury (as opposed to death)."

¶11 In support of his argument, Martinez cites *State v. Ontiveros*, 206 Ariz. 539, 81 P.3d 330 (App. 2003). There, the trial court had instructed the jury that attempted second-degree murder required proof of the following: "The defendant intentionally committed an act; and . . . [t]he act was a step in a course of conduct which the defendant planned or believed would cause the death or serious physical injury of another person." *Id*. ¶ 5. Division One of this court found the instruction had "misstated the law by authorizing the jury to find Ontiveros guilty even if he knew only that his conduct would cause serious physical injury and did not intend or know that his conduct would cause death." *Id*. ¶ 11. The court reasoned that, because the offense of attempt "requires an act that is a step in a course of conduct 'planned to culminate' in the attempted offense," *id*. ¶ 9, *quoting* A.R.S. § 13-1004(A)(2), and the culmination of the offense of second-degree murder is the "death of another person," *id.,* the offense of attempted second-degree murder necessarily "requires proof that the defendant intended or knew that his conduct would cause death." *Id*. ¶ 14.

¶12 Martinez claims "the jury received an instruction nearly identical to the one used in *Ontiveros*" and "may have convicted [him] based on an erroneous theory of law." We disagree. The instruction here did include language similar to that used in *Ontiveros*: the

"defendant attempted to cause the death of another person by conduct which he knew would cause death or serious physical injury." Unlike in *Ontiveros*, however, the first part of the above quoted instruction clearly provided that Martinez must have had that knowledge as part of an "attempt[] to cause the death of another person." And the jury was instructed that a person commits attempt if he or she takes "any step in a course of conduct planned to culminate in [the] commission of an offense." Thus, to convict Martinez, the jury must have found, at a minimum, that Martinez's knowledge was part of a "course of conduct planned to culminate" in the death of another person. *Id*. The instruction, therefore, was in accordance with *Ontiveros* because it "require[d] proof that [Martinez] intended or knew that his conduct would cause death." *Id*. ¶ 14. Thus, we cannot say the trial court's instruction constituted error, must less fundamental error.

Disposition

¶13 Martinez's convictions and sentences are affirmed.

PHILIP G. ESPINOSA, Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

J. WILLIAM BRAMMER, JR., Judge